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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 2002

ALEXANDRA YORK,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK;
CONRAD HARPER, a former Association President;
STEPHEN C. KASS, a former committee chair; and
JOHN FRENCH, a former committee chair,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALEXANDRA YORK,

Plaintiff,

MEMORANDUM DECISION

v.

00 Civ. 961 (DC)

THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, et al.,

Defendants.

APPEARANCES: ALEXANDRA YORK, ESQ.
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Chin, D.J.

In this case, pro se plaintiff, an attorney, contends that she was sexually harassed while she was performing volunteer committee work as a member of the Association of the Bar of the City of New York (the "Association"). She sues the Association, two former committee chairmen, and a former president under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), the New York Human Rights Law, N.Y. Exec. Law § 290 et seq. (the "NYHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-502 (the "CHRL").

Defendants move to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b) (1) and 12 (b) (6) on the grounds that (1) the Court lacks subject matter jurisdiction because plaintiff fails to state a claim under Title VII, the only basis for federal jurisdiction, because she was not an employee of the Association, and (2) her claims of discrimination under state and city law are barred by the election of remedies doctrine. For the reasons set forth below, defendants' motion is granted and the amended complaint is dismissed for failure to state a claim upon which relief may be granted.

BACKGROUND

I. Facts

For the purposes of this motion, I assume the facts as alleged in the amended complaint to be true.

The Association is a voluntary bar organization with more than 22,000 members. It is open to all attorneys in good standing. At all relevant times, plaintiff was a dues-paying member of the Association. (Am. Compl. ¶ ¶ 19, 26).

From 1989 to 1992, under the supervision of committee chairs, plaintiff developed five international environmental law

projects for the Association. (Am. Compl. ¶ ¶ 72, 74). Defendants John French and Stephen C. Kass both served as committee chairs, and during that time defendant Conrad Harper was president of the Association. (Am. Compl. ¶ ¶ 33-42).

Plaintiff did not receive wages for her activities at the Association, but she "worked for the defendant Association with the expectation that she would receive the employment opportunities which resulted from her work at the Association." (Am. Compl. ¶ ¶ 21-22). Plaintiff alleges that from 1990 to 1992, defendant French "constantly harassed [her] with sexual remarks and propositions." (See Am. Compl. ¶ ¶ 111-15, 118). Plaintiff also claims that because she refused to tolerate French's conduct, plaintiff was denied "employment opportunities," such as support for her Association projects and membership on or chairmanship of committees and/or projects. (Am. Compl. ¶ 124).

Plaintiff further alleges that she was also sexually harassed by defendant Kass, for approximately one year from 1991 to 1992. (Am. Compl. ¶ ¶ 143-44, 174). Plaintiff claims that because she refused to submit to Kass's "sexual advances," Kass denied plaintiff employment opportunities -- specifically, that he did not permit her to participate in certain committee work or to represent the Association at certain conferences. (Am. Compl. ¶ ¶ 173-75, 262).

In May 1992, plaintiff filed a complaint with the New York State Division of Human Rights (the "Division") against the Association and Kass alleging sexual discrimination in a place of public accommodation. (Pl. Exs. A & D).1 Plaintiff claims that because she told French that she filed a complaint with the Division, French rescinded his offer to sponsor plaintiff's application for membership in a private club and

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1 References made to "Pl. Ex." refer to Plaintiff's Exhibits to the amended complaint.

would not continue to work with her.2 (Am. Compl. ¶ ¶ 126-29). The Division refused to allow plaintiff to amend her complaint to add allegations of employment discrimination because plaintiff was "not an employee of Respondent Association, and therefore, cannot make such an amendment." (Pl. Ex. D, at 15). In 1998, the Division held a ten-day hearing in front of an administrative law judge, which resulted in a 1900-page transcript. During the proceedings, plaintiff was represented by counsel. (Am. Compl. ¶ ¶ 48-49, 52). On August 20, 1999, the Division issued a 19-page order dismissing the complaint, finding that the Association and Kass did not discriminate against plaintiff in a place of public accommodation because of her sex. (Pl. Ex. D, at 14). On April 26, 2000 the Equal Employment Opportunity Commission ("EEOC") sent plaintiff a right-to-sue letter. Neither plaintiff's underlying complaint to the Division nor the right-to-sue letter named Conrad Harper or John French as respondents.

II. Procedural History

Plaintiff commenced this action by filing a complaint against the Association, Harper, Kass, and French on August 11, 2000. She filed a 726-paragraph amended complaint on September 19, 2000. Plaintiff does not allege that Harper personally engaged in any harassing or discriminatory conduct, but includes Harper as a defendant because, as president of the Association, he exercised his "authority to select and employ members of the Association to work for the Association and its committees, [and] to supervise, direct, approve, disapprove, and

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2 In the Division complaint, plaintiff alleged misconduct only by Kass, not French. Plaintiff now asserts that upon notifying French that she filed the complaint with the Division, French told plaintiff "Kass is a friend of mine. If you do this, I have nothing further to do with you." (Am. Compl. ¶ 352).

control their work . . . ." (Am. Compl. ¶ 34).

Plaintiff alleges discrimination in employment by the Association on the basis of sex and sexual harassment and retaliation, in violation of Title VII, and discrimination in employment and in place of public accommodation by Kass, French, Harper, and the Association on the basis of sex and sexual harassment and retaliation, in violation of the NYHRL and the CHRL. Plaintiff also asserted claims for defamation and intentional infliction of emotional distress.

On October 25, 2000, defendants filed this motion to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12 (b) (1) and 12 (b) (6) for lack of subject matter jurisdication and failure to state a claim upon which relief may be granted.3 By memorandum endorsement dated December 13, 2000, the Court granted plaintiff's requests to withdraw the defamation and intentional infliction of emotional distress claims.

DISCUSSION

I. Standard for Motion to Dismiss For Failure to State a Claim

When reviewing a motion to dismiss for failure to state a claim, a court must accept as true the facts presented in the complaint and must view the pleadings in the light most favorable to, and draw reasonable inferences in favor of, the non-moving party. See Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). A court shall dismiss a complaint only when "it appears beyond doubt that the plaintiff can prove

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3 Defendants contend that the Court lacks subject matter jurisdiction over this action because plaintiff fails to state a viable federal claim. The motion is more properly characterized as a motion to dismiss for failure to state a claim upon which relief may be granted, and I will treat is as such.

no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); accord Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 71 (2d Cor. 1998), cert. Denied, 525 U.S. 1103 (1999); Gangemi v. Johnson, No. 98 Civ. 8470, 1999 WL 777861, at *1 (S.D.N.Y. Sep. 30, 1999). The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support [her] claims." Villager Pond, Inc. v. Town of Darien, 56 F. 3d 375, 378 (2d Cir. 1995) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)), cert. Denied, 519 U.S. 808 (1996). In considering a motion to dismiss, a court may consider only the allegations of the pleadings and documents that are integrated in the pleading by reference. See I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co., Inc., 936 F.2d 759, 762 (2d Cir. 1991).

II. Plaintiff's Claims

Defendants move to dismiss the Title VII claims on the grounds that plaintiff was not an employee of the Association and the NYHRL and CHRL claims on the grounds that they are barred by the election of remedies doctrine.

A. Title VII Claims

1. Applicable Law

Title VII prohibits discrimination in employment; it is "available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers." Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996) (quoting Tadros v. Coleman, 717 F. Supp 996, 1003 (S.D.N.Y. 1989), aff'd, 898 F.2d 10 (2d Cir. 1990)); see also Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) ("The

objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities."). Title VII does not protect plaintiffs who do not quality as employees. Kern, 93 F.2d at 45. Moreover, it is not a "legal catchall." Tadros, 717 F. Supp. at 1003. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1988) (The 'standards for judging [allegedly discriminatory conduct] are sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace." (internal quotations omitted)).

Volunteers are generally not considered employees under Title VII. See O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997); Tadros, 717 F. Supp. at 1003. "Plaintiffs who have without question rendered service to an appreciative defendant are not deemed Title VII 'employees' solely by dint of their labor." Id. (holding volunteers are not employees). "Where no financial benefit is obtained by the purported employee from the employer, no plausible employment relationship of any sort can be said to exist because . . . compensation by the putative employer to the putative employee in exchange for his [or her] services is an essential condition to the existence of an employer-employee relationship." O'Connor, 126 F.3d at 115-16 (internal quotation omitted).

The courts have found that "an employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits." Pietras v. Bd. Of Fire Comm'rs of the Farmingville Fire Dep't, 180 F.3d 468, 473 (2d Cir. 1999); see also O'Connor, 126 F.3d at 116 (discussing Haavistola v. Cmty. Fire Co., 6 F.3d 211, 221 (4th Cir. 1993)).

Because either direct or indirect remuneration is an essential condition for a relationship to be one of employment under Title VII, the courts have generally found volunteers not to be employees for purposes of Title VII. See, e.g., O'Connor,

126 F.3d at 116 (college student volunteering at psychiatric hospital is not a Title VII employee); Tadros, 717 F. Supp. at 1003 (doctor, whose appointment involved neither pay nor duties, but only library privileges is not a Title VII employee). In Haavistola, 6 F.3d 211, however, the Fourth Circuit held that a volunteer at a fire company who received indirect compensation was an employee under Title VII. Although the plaintiff in that case did not receive a salary, she was deemed an employee because she received benefits such as disability pension, survivors' benefits for dependents, death and disability scholarships for dependents, and group life insurance. Haavistola, 6 F.3d 211, 222 ("the benefits represent indirect but significant remuneration").

2. Application

Here, even assuming the factual allegations of the amended complaint are true, plaintiff was merely a volunteer and her work for the Association did not give rise to an employment relationship. Plaintiff was merely a dues-paying member who volunteered to work on several projects for various Association committees. (Am. Compl. ¶ 19). No reasonable jury could conclude, on the facts alleged in the amended complaint, that plaintiff was an employee under Title VII because she did not receive either direct or indirect compensation in exchange for her work at the Association. Moreover, plaintiff's "work" did not consist of services rendered specifically for the Association; rather she did bar committee work for the benefit of the bar at large.

Plaintiff argues that she was an employee. Although plaintiff concedes that she did not receive wages (Am. Compl. ¶ 21), she alleges that she received membership benefits that amounted to indirect compensation sufficient to create an employee/employer relationship.

Specifically, plaintiff claims that options to purchase insurance and apply for a credit card, reimbursement for expenses incurred while working on the Association projects, group discounts for car rental and hotel accommodations, and opportunities to network with other lawyers amounted to indirect remuneration. (Am. Compl. ¶ ¶ 22-23, 28-29, 128, 378-79' {;/ Br/ 11-14). Accordingly, plaintiff asserts, she was an employee of the Association and is entitled to Title VII protection. I disagree.

Contrary to plaintiffs' assertions, the membership benefits do not amount to compensation. The benefits plaintiff identified are available to all Association members and were not offered to plaintiff in exchange for her work. (PL. Br. at 12). Moreover, the opportunity to network with others is merely an incident of plaintiff's association with other attorneys through the Association; such an opportunity is not a benefit that the Association offered as compensation. That plaintiff expected to receive job opportunities through her involvement with the Association does not transform her relationship with the Association into one of employee/employer. (Am. Compl. ¶ 22).

Even viewing the allegations in a light most favorable to plaintiff, plaintiff's volunteer work did not qualify her as an employee of the Association, and, accordingly, plaintiff fails to sufficiently plead an essential element of a Title VII violation. See O'Connor, 126 F.3d. at 115-16. Plaintiff's Title VII claims are dismissed.

B. NYHRL and CHRL Claims

1. Applicable Law

Section 297(9) of the NYHRL provides a cause of action

for unlawful discriminatory practices. N.Y. Exec. Law § 297(9). Unlike Title VII, the NYHRL is not restricted to employment relationships, and, instead, applies as well to unlawful discrimination in education, housing, and places of public accommodation. N.Y. Exec. Law § 291.

The Human Rights Law contains an "election of remedies" limitation that bars "a person who has filed a complaint . . . with any local commission on human rights" from filing a lawsuit for the same cause of action. Id.; Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2d Cir. 2000); Vails v. Police Dep't of the City of New York, 54 F. Supp. 2d 367, 375 (S.D.N.Y. 1999).

A statutory exception to the election of remedies doctrine provides that where the complaint filed with a local human rights commission is dismissed for administrative convenience, a person is not barred from filing a plenary lawsuit. N.Y. Exec. Law § 297 (9); Whidbee, 223 F.3d at 75; Pugh v. Mem'l Sloan Kettering Cancer Ctr., No. 97 Civ. 8594, 1998 WL 158764. at *2 (S.D.N.Y. April 6, 1998) (Dismissal for administrative convenience is a narrow category "limited to cases where the dismissal is . . . for the convenience of the agency."). The statute also provides an exception for a case where a complaint was filed by the EEOC with the Division pursuant to the Title VII requirement that all complaints filed directly with the EEOC be deferred to the Division. See N.Y. Exec. Law § 297 (9) (citing 42 U.S.C. § 2000e-5(c)). See also Morelli v. Cedel, No. 96 Civ. 2874, 1997 WL 61499, at *8 (S.D.N.Y. Feb. 13, 1997), vacated in part by 141 F.3d 39 (2d Cir. 1998); Bouker v. Cigna Corp., 847 F. Supp. 337, 339-40 n.6 (E.D. Pa. 1994).

The language of the CHRL is nearly identical to that of § 297 (9) and bars a person who has filed a complaint with either the city human rights agency or the Division from filing a plenary judicial action under the CHRL as well. N.Y.C. Admin.

Code § 8-502(a); see also McNulty v. New York City Dep't of Finance, 45 F. Supp. 2d 296, 303 (S.D.N.Y. 1999).

2. Application

Here, the election of remedies doctrine precludes plaintiff from filing suit for her NYHRL and CHRL claims because plaintiff elected to pursue her claims first through the Division. See N.Y. Exec. Law § 297 (9). Plaintiff filed her complaint with the Division, retained counsel, and participated in a ten-day hearing in front of an administrative law judge. (Am. Compl. ¶ ¶ 48-49, 52).

Plaintiff argues that she is not subject to the election of remedies doctrine because of the applicable statutory exceptions and because her constitutional rights have been violated. These arguments, however, are not persuasive.

Plaintiff asserts that two statutory exceptions to the election of remedies doctrine apply here. First, plaintiff claims that the Division's dismissal of certain allegations is theoretically similar to a dismissal for administrative convenience because the Division's refusal to allow plaintiff to amend her complaint to add allegations of employment discrimination had the same effect as if the Division had dismissed those claims for administrative convenience. (Pl. Br. At 22-23). See N.Y. Exec. Law § 297 (9) ("where the [human rights] division has dismissed [the] complaint on the grounds of administrative convenience, . . . [plaintiff] shall maintain all rights to bring suit as if no complaint had been filed with the division").

Plaintiff's attempt to invoke the administrative convenience exception is misplaced. The Division, in its

decision, stated that it would not consider plaintiff's allegations of employment discrimination because plaintiff had not raised those claims in her complaint. (See Pl. Ex. D, at 14). Moreover, the Division concluded that plaintiff was not an "employee" under governing law, and therefore plaintiff could not amend her complaint to raise employment law claims (Id.).

Plaintiff relies on Promisel v. First Am. Artificial Flowers, Inc., 943 F.2d 251 (2d Cir. 1991). In Promisel, however, the "complaint with[the Division] was dismissed for administrative convenience." 943 F.2d at 253. Here, instead, the Division conducted a hearing and issued a decision on the merits finding that plaintiff was not discriminated against and that she was not an employee; the complaint was not dismissed for administrative convenience. (Pl. Ex. D). Accordingly, plaintiff is not exempt from the election of remedies doctrine under the administrative convenience exception.

Plaintiff seeks to invoke a second statutory exception to § 297 (9). This exception exempts a complaint that was filed by the EEOC to comply with the EEOC's obligations under Title VII. N.Y. Exec. Law § 297 (9). This provision of § 297 (9), however, does not apply here because plaintiff filed her complaint directly with the Division, not the EEOC.

Plaintiff also argues that she was denied her rights to due process and equal protection because she was not given the opportunity to properly litigate her issues before the Division. (Pl. Br. at 24-29). The argument is rejected. First, plaintiff raises these allegations only in her brief and in paragraph 1 of the amended complaint. Plaintiff does not include violations of constitutional rights among the 23 claims she asserts in the amended complaint. Second, to the extent plaintiff belatedly seeks to raise constitutional claims, the Association and the individual defendants are not state actors. See Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 924, 929 (2001). Third, the election of remedies doctrine bars

plaintiff from raising the NYHRL and CHRL claims in a plenary judicial action; plaintiff cannot challenge the Division's ruling in this lawsuit as her recourse is to seek judicial review by filing a petition for review in accordance with § 298 of the NYHRL, N.Y. Exec. Law § 298. Hence, defendants' motion to dismiss those claims is granted as well.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss all remaining claims in the amended complaint is granted. The amended complaint is hereby dismissed, with prejudice, for failure to state a claim upon which relief may be granted and because the NYHRL and CHRL claims are barred by the election of remedies doctrine. The Clerk of the Court shall enter judgment accordingly.

SO ORDERED.

Dated: New York, New York
July 9, 2001

s/_____
Denny Chin
United States District Judge